

WHEN DID JOHN YOO START THE BYBEE MEMO?

I've been puzzling over two references in John Yoo's testimony at the House Judiciary Committee's Assholes Who Torture hearing last summer regarding the timing of the drafting of the August 1, 2002 Bybee Memos.

The legal issues that concern the Subcommittee today—involving the interrogation of alien enemy combatants—first arose about six months after the 9/11 attacks, in which about 3000 of our fellow citizens were killed in surprise terrorist attacks in New York City and Washington, D.C.

This timing makes a lot of sense. It would put the start of the legal considerations regarding torture techniques at around March 2002, which is when Abu Zubaydah was captured.

But then later, he dates the **first request for an opinion** much earlier—to a few months after 9/11.

We gave substantially the same advice to both agencies. Both matters at the time were highly classified and the pressures of time and circumstances were high—we received the first request a few months after the September 11, 2001 terrorist attacks on New York City and Washington, D.C.

[Side note—I wonder if he mentions 9/11 every time he gives dates, as in, "I got married approximately 13 years before terrorists killed 3000 people in New York City and Washington D.C. I moved to Chapman University eight years after the September 11, 2001 terrorist attacks? Update—I guess MadDog's been puzzling on this

point too!]

Now, there are a couple of possible explanations for the seeming discrepancy.

There's sloppiness—perhaps in the second reference, Yoo was just interpreting "few" expansively so he could remind his audience of 9/11 and the pressure they were under. I don't really buy this though, because this statement has to have been incredibly heavily vetted by DOJ and his own lawyers (note the prominence of expressions of "good faith" and "we tried as best we could"). Given the legal scrutiny Yoo is and was under when he gave this statement in a sworn appearance before Congress, I simply don't believe that Yoo's lawyers would permit such an inaccuracy.

There's the possibility, too, that Yoo is thinking of another detainee-related memo. Perhaps the most likely explanation is that Yoo is thinking of one of the still-unreleased memos published in late 2001 and early 2002, including one of the following:

November 20, 2001: John Yoo to Alberto Gonzales, on "War Crimes Act, Hague Convention, Geneva Conventions, federal criminal code, and detainee treatment"

January 11, 2002: John Yoo to Alberto Gonzales, on the Geneva Conventions

January 14, 2002: John Yoo to William Taft, on prosecution under the War Crimes Act for conduct against al Qaeda

January 22, 2002: Jay Bybee and John Yoo to Alberto Gonzales, concluding the Geneva Conventions do not apply to al Qaeda

January 24, 2002: John Yoo to Alberto Gonzales, on the Geneva Conventions

January 24, 2002: John Yoo to Larry Thompson, on the application of international law to the US.

January 26, 2002: John Yoo to Larry
Thompson, on the Geneva Conventions

So perhaps when Yoo refers to the "first request," he is referring to the first request for memos that—in their collective—would eviscerate international law as it pertained to the detainees.

But I do wonder whether Yoo began Bybee One—the memo asserting that,

Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President.

—was first drafted long before August 2002? After all, we know that Yoo's 2003 memo—which made parallel claims as the Bybee Memo did in the context of the military—was drafted a couple of months before it was published in March 2003. And as a generalized memo, Bybee One did not depend on discussions held in the wake of Abu Zubaydah's capture in March 2002.

I ask this question largely because of the suggestion that email evidence may show some of the opinions were originally rejected. Clearly, as early as November 2001, Yoo was chipping away any legal limits on torturing detainees. My question is, how long did it take him before he declared that, "if it was authorized by the President, it did not violate the law"?